

CHONG HOONG & ANOR. v. WONG YUEN SANG

[O.C.J. (Chang Min Tat J.) May 15, 1975]
[Kuala Lumpur — Civil Suit 1356 of 1974]

Land Law — Sale of land — Specific performance — Application for specific performance of an agreement of sale of a piece of land — Clause requiring approval of Ruler-in-Council before transfer of land not included in the agreement — Refusal on vendor's part to complete the transfer — Whether justifiable — R.S.C. 1957, O.14A.

The vendor agreed in writing to sell a piece of land to the plaintiffs. In the said agreement, it was expressed that the agreement was subject to the approval of the court as the vendor sold in his capacity as administrator of the estate of the deceased proprietor. However, no reference was made to the restriction that the land could not be transferred without the prior consent of the Ruler-in-Council. An application was made to the court for approval, but it was pointed out that the court could not approve the sale without the prior consent of the Ruler-in-Council. No order was then asked for. A subsequent application for removal of the restriction was approved subject to the payment of a premium of \$1,600 but the approval was withdrawn when the premium was not paid. However the premium was later paid by the plaintiffs and the removal of the restriction approved. The plaintiffs claimed for specific performance of the said agreement. The vendor contended that the agreement had been frustrated by the refusal to lift the restriction.

Held, allowing the plaintiffs' application: it was clear from a consideration of the correspondence that the withdrawal of the first approval was because of the failure to pay the premium which, in the absence of any provisions in the agreement of sale, must be paid by the vendor in order to adduce a good and registrable title. It therefore did not lie in the vendor's mouth to say that there was no approval.

CIVIL SUIT.

L. H. Lee for the plaintiffs.

P. S. Gill for the defendant.

Chang Min Tat J.: This was another Order 14A application set before me and adjourned into open court for arguments.

The claim was for specific performance of an agreement of sale of a piece of land. The agreement was drawn up by a firm of solicitors and parties to the agreement employed the same solicitors and therefore their execution of the document was before the same solicitor. I am advised, and I accept without reservation, that the solicitor who attested the execution was not the particular solicitor who took instructions or drafted the agreement.

The vendor sold in his capacity as administrator of the estate of the deceased proprietor. The agreement was therefore expressed quite correctly as being subject to the approval of the court.

The agreement however was silent on another aspect which was very very material. The grant of the lease from the Government was subject to a restriction in interest and the land could not be transferred, leased, tenanted, charged or otherwise disposed of without the prior consent of the Ruler-in-Council. No reference to this restriction in interest was made in the agreement. The agreement was consequently silent that it must be subject to the approval of the Ruler-in-Council being obtained.

Shortly after the agreement was executed, the solicitors for the vendor/defendant in pursuance of the requirement of the approval of court applied in O.S.

A 85/73 for the approval of the sale by the administrator to the purchasers. When the originating summons came up for hearing the solicitor for the defendant pointed out, as it was his duty to do, that the court could not approve the sale without the prior consent of the Ruler-in-Council. The solicitor then asked for no order and it was clear from the subsequent correspondence that no order was made at his request because of the restriction in interest.

B Next there followed a series of correspondence between the parties and the Land Office. It would be convenient if I set out the correspondence in the order of their occurrence. The letters disclose the true position better than any words of mine could.

C Letter A was a letter dated June 5, 1973 from T.C. Tang the solicitors for the defendant to Ling & Lee referring to the O.S. 85/73 and advising that as no order was made at their request because of the restriction they now offered to return the deposit hitherto paid. In other words they considered that the contract had been rescinded or frustrated.

D Letter B was a letter dated July 17, 1975 from the Assistant Collector of Land Revenue, Petaling Jaya, to T.C. Tang in reply to their letter dated July 7, 1973, approving the removal of the restriction subject to the payment of a premium of \$1,600.

E Letter C was a letter dated August 29, 1973 from Ling & Lee enclosing "an application form". The letter was headed "Application to the Ruler-in-Council to lift restriction in interest". But it is clear from the subsequent letters of July 17 and September 3 read together with this letter, the application form was in effect a transfer form.

F Letter D was a letter dated September 3, 1973 from T.C. Tang to the Land Office, Petaling Jaya enclosing a transfer form (Borang Pindaan Milek).

Letter E was a letter dated September 11, 1973 to T.C. Tang refusing registration and also stating that the approval of the restriction has now been withdrawn.

G Letter F was dated September 26, 1973 from T.C. Tang to Ling & Lee referring to the rejection by the Land Office and asserting that "We have done our best to transfer the above property."

Letter G was a letter dated March 23, 1974 from the A.C.L.R. to the plaintiffs saying that the restriction in interest would be lifted on the payment of a premium of \$1,600.

H Letter H was the office copy of the letter dated April 1, 1975 from Ling & Lee to the A.C.L.R., Petaling Jaya, paying the \$1,600.

I Letter I was a letter dated April 2, 1975 from the A.C.L.R. acknowledging receipt of \$1,600 and enclosing a receipt.

Letter J was a letter dated April 3 from Ling & Lee to the defendant advising that the restriction has been lifted.

Letter K was a letter of the same date from Ling & Lee to T.C. Tang in the same vein and asking them to take steps to complete the transfer.

The writ was started, as I understand it, because no action was taken either by the vendor or his solicitors to complete the transfer. The first argument by the defendant's counsel was that the rejection by the court of the application by the administrator to transfer the land had absolved them from any duty to complete and because of that the contract had been frustrated. The short answer to that as given by learned counsel for the plaintiffs was that that was putting the cart before the horse. It was also not true that the court had rejected the application. Quite clearly on the advice of the counsel for the defendants the court realised that the application was premature and that it should have been made after the approval of the Ruler-in-Council had been obtained. Counsel for the defendant could have but did not adopt the course of adjourning the originating summons until the decision of the Ruler-in-Council was known. The argument that the defendant had done everything within his power to complete the purchase was untenable and untrue.

Next, it was clear from a consideration of the correspondence that the withdrawal of the first approval was because of the failure at any time to pay the premium. In the absence of any provisions in the agreement of sale quite clearly the premium must be paid by the vendor in order to adduce a good and registrable title. It therefore did not lie in his mouth to say that there was no approval. Fortunately the purchasers were astute enough to apply for the removal of the restriction themselves, and having obtained the approval to forward the money to the Government against the balance of the purchase price which they had to pay.

Counsel for the defendant however said that he did not know of the letter from his firm dated July 6, 1973 and Letter B. He went through the motion of searching his file and he advised that he was unable to find these two letters. While I accepted his explanation without reservation I did not understand him to say that these letters were not received or were not in existence; they could have been mislaid or put in the wrong file; and in any event there was ample time for him if he desired to challenge their existence to check from the records of the Land Office. In my view there could be no doubt about the genuineness of the existence of these letters. References therein to the files both of the solicitors for the vendor and of the Land Office were in my view proof of their existence.

The main contention of the defendant was that he had performed all his obligations under the agreement but that the agreement had been frustrated by the refusal to lift the restriction. I had already dealt with what I believed to be the reason why the first consent to lifting the restriction was revoked and held the defendant himself to blame for it. In the events that happened there is now no more restriction and there is no impediment at law except for the formal approval of court for sale by the administrator to the completion of the agreement. I could not see that the defendant had any leg, legal or equitable, to stand on and therefore I make an order in terms of the summons for specific performance of the agreement of sale, with costs.

A The defendant will now have to apply to court for approval of the sale. I venture to believe that the application by an administrator to sell a piece of land of which he himself is the sole beneficiary is only a matter of formality but I should make it clear that in the unlikely event of a refusal by the court the defendant would not be in contempt.

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Order accordingly.

Solicitors: *Ling & Lee; T. C. Tang & Co.*

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**PALKA UTAMA SHIPPING CO. LTD. v.
"SRI MELATI" (OWNERS) & PARTIES
INTERESTED; THE "SRI MELATI"**

[O.C.J. (Arulanandam J.) September 8, 1975]
[Penang — In Rem Admiralty Suit No. 5 of 1975]

D *Shipping — Admiralty suit in rem — Writ issued against defendants for payment of goods and services rendered — Ship arrested on issuance of warrant of arrest — Defendants sought to set aside writ — Claim that defendants not liable in personam and therefore, action in rem not maintainable — Whether arrest was wrongful — Courts of Judicature Act, 1964, s. 24(b) — R.S.C. 1957, O.5 r.16.*

Practice and Procedure — Admiralty suit in rem — Writ issued against defendants for payment of goods and services rendered — Warrant of arrest issued — Affidavit in support of warrant of arrest — Defendants claimed that affidavit was defective — R.S.C. 1957, O.12 r.30, O.38 r.10, O.70, O.75 rr. 5(7) & (9).

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On February 13, 1975, the plaintiffs issued a writ against the defendants claiming payment for goods supplied and services rendered to the defendants, and at the latter's request in connection with the defendant's vessels including "Sri Melati". A warrant of arrest was issued on April 7, 1975 and the ship was arrested.

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The defendants entered a conditional appearance and applied by motion for the writ to be set aside. They claimed that they were the registered owners of the said vessel which had been chartered to one Inter Indo Enterprises Company of Singapore and that it was this company that had entered into a written agreement with the plaintiffs. The defendants therefore claimed that they were not privy in any way to the plaintiffs and as they were not liable in personam, an action in rem was not maintainable against them. The defendants further contended that the arrest was wrongful and the affidavit supporting the warrant of arrest was defective.

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Held: (1) at this stage of the proceedings there was no conclusive evidence to satisfy the court that the defendants could not be liable in personam;

(2) an action in rem would lie against a vessel which was in complete possession and control of persons (who need not own all the shares in the vessel) other than the registered owners viz. charterers by demise: *The "Andrea Ursula"*; (3)

H

(3) the absence of a specific statement that the claim remained unsatisfied was not a fundamental error but a mere irregularity which did not render the affidavit invalid;

(4) the defendants' contention that the affidavit was signed before the writ was issued, and was therefore inadmissible, could not avail: *H. Stacey v. Diamond Metal Products Co. Ltd. & Anor.* (1) distinguished;

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(5) O.5 r.16(a) of the R.S.C. has been complied with, the warrant of arrest was properly issued and no injustice has or could have been caused to any party;

(6) the motion to set aside the writ should therefore be dismissed with costs.

Cases referred to:-

(1) *H. Stacey v. Diamond Metal Products Co. Ltd. & Anor.* [1935] M.L.J. 249.

(2) *The St. Merriel* [1963] 1 All E.R. 537.

(3) *The "Andrea Ursula"* [1971] 1 Lloyd's Rep. 145.